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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., and
DOROTHY SCOTT MONTGOMERY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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No. 20,451

EDWIN JONES MONTGOMERY, SR., and
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Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court wrote no opinion, but filed an order of dismissal (I-A R. 71)^{1/} and an order denying a motion to set aside the order of dismissal (I-A R. 72).

JURISDICTION

This petition for review (I-A R. 84-85) involves federal income taxes for the taxpayer's calendar years 1957 through 1960. By his notice of deficiency mailed on December 12, 1963 (I-A R. 7), the Commissioner determined deficiencies for the taxable years in the amounts as follows (I-A R. 7):

^{1/} "I-A R." references are to volume I-A of the transcript of proceedings; and "II-B R." references are to volume II-B of the transcript of proceedings. Except for the first four pages of volume II-B, the pages are numbered chronologically. The first four pages will be referred to as "II-B, Hearings, May 27, 1964, p. ____".

<u>Year</u>	<u>Amount</u>
1957	\$1,175.27
1958	1,610.16
1959	4,093.05
1960	2,637.47

Within ninety days and on March 6, 1964, taxpayer filed a petition for redetermination with the Tax Court, pursuant to Section 6213 of the Internal Revenue Code of 1954. (I-A R. 1-6.) In response to the petition, the Commissioner, on April 17, 1964, filed a motion to dismiss for failure properly to prosecute. (I-A R. 20, 21.) Thereafter, on May 25, 1964, the taxpayer filed an amendment to his petition. (I-A R. 23-27.) At the hearing on the Commissioner's motion to dismiss held on May 27, 1964 (II-B, Hearing, May 27, 1964, pp. 1-4), the Tax Court ruled that the such amendment did not cure the defects in the petition and ordered, on or before August 20, 1964, the filing of a proper amended petition, or the showing of cause why the petition should not be dismissed for failure properly to prosecute (I-A R. 32). Pursuant to the order, taxpayer, on August 18, 1964, filed an amended petition. (I-A R. 33-40.) The order of dismissal (I-A R. 71) of the Tax Court was entered on April 15, 1965, and on May 12, 1965, the Tax Court entered its order denying taxpayer's motion to set aside the order of dismissal (I-A R. 72). Within the three month period prescribed in Section 7483 of the Internal Revenue Code of 1954, the taxpayer, on July 12, 1965, filed a timely petition for review. (I-A R. 84-85.) On August 12, 1965, venue for review of the order of dismissal and decision by this Court with respect to the taxable year 1957 was stipulated by the parties pursuant to Section 7482(b)(2) of the Internal Revenue Code of 1954.

(I-A R. 98.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

Whether, under the record before it, the Tax Court abused its discretion (a) in denying the taxpayer's motions for continuance when it appeared that the taxpayer, having had ample time, exercised not the slightest diligence in the marshalling of any evidence necessary to sustain his burden, (b) in granting the Commissioner's motion to dismiss for lack of prosecution when the taxpayer refused to go forward with the proceeding, and (c) in denying the taxpayer's motion to set aside the order of dismissal.

RULES INVOLVED

The applicable rules of practice of the Tax Court are set forth in the Appendix, infra.

STATEMENT

This petition for review presents to this Court for decision the question whether the Tax Court committed reversible error by abusing its discretion in denying taxpayer's motions for continuance, by granting the Commissioner's motion to dismiss for lack of prosecution, and through its refusal to set aside the order of dismissal at the instance of the taxpayer.

Edwin Jones Montgomery, Sr., and Dorothy Scott Montgomery, husband and wife, reside in Ormsby County, Nevada. (I-A R. 33.) Mrs. Montgomery's interest herein arises only because she filed joint returns with Mr. Montgomery who will hereinafter be referred to as the "taxpayer".

Individual income tax returns for the taxpayer's taxable years 1958-1960 were filed with the District Director of Internal Revenue in San Francisco, California, and for the taxable year 1957, his individual return was filed with the District Director of Internal Revenue in Detroit, Michigan. (I-A R. 33-34, 54.)

During the years involved in this proceeding the taxpayer, an engineer, the holder of two college degrees, a teacher and mathematics instructor (II-B R. 36-37), was a full time salaried employee of a series of employers (II-B R. 52, 69-70).^{2/} "In addition to this", as taxpayer's counsel explained, "Mr. Montgomery in an effort to make every dime he possibly could, * * * worked weekends and nights as a sort of freelance engineer or salesman." (II-B R. 69-70.) It was in connection with the latter alleged activities that taxpayer sought, without substantiating his right so to do, to deduct from his overall gross income large amounts as business expenses^{3/} which resulted in claims of substantial business losses. (I-A R. 8.) For each of the

2/ The nature of these employments was not established with precision at the hearing. Taxpayer's counsel explained to the Court (II-B R. 59): "Your Honor, may I just say that Mr. Montgomery has worked at a great many places and for a great many different people over the course of the years in question, and one of the problems we have is that he simply cannot recall now exactly what dates he worked and exactly what places."

3/ Below, Government counsel, in the presence of taxpayer and his counsel described to the Tax Court the effect of this practice. Without contradiction, it was pointed out with reference to the years 1950 to 1960 (II-B R. 20):

Examination of all returns for years '50 to '60 will show that in various years Petitioner has claimed he has been in various businesses. In these businesses he reports less than \$50.00 of income but more than \$5,000 of expenses. He does this year after year.

(Continued on following page.)

years in issue, taxpayer also claimed depreciation on rental property without establishing the depreciable basis thereof (I-A R. 9, 10, 12, 15), and, in two of such years, without substantiation, claimed deductions for repairs and a casualty loss resulting from fire (I-A R. 12, 15). In two of the years before the court, taxpayer claimed, also without substantiation, deductions for casualty losses resulting from theft and an automobile accident. (I-A R. 8, 12.) And in 1960 taxpayer deducted \$31,500 as a loss resulting from the worthlessness of certain bonds without establishing their basis or the year in which they became worthless. (I-A R. 15.)

This case has been under investigation since November 9, 1959, and although investigating revenue agents made numerous attempts to obtain substantiating evidence between that date and December 12, 1963, the date the notice of deficiency was mailed, the taxpayer failed to produce such evidence. (I-A R. 61-62.) At least as early as April 4, 1961, and more than four years before the hearing below, the Internal Revenue Service wrote to taxpayer concerning the substantiation of the deductions here in issue. (II-B R. 109-110.) In a series of letters to the Internal Revenue Service beginning at least as early as July 15, 1962, taxpayer asserted variously that it would be difficult for him to substantiate his case because his records were burned or destroyed and that, if given a little more time, he would produce such substantiating records and evidence. (II-B R. 4.)

3/ (Continued from preceding page.)

The tax consequence of the deduction of these alleged business expenses is startling. While taxpayer earned gross income in full time employment in the form of salary in amounts averaging approximately \$12,000 per year, the total amount of his federal income tax payments during those years was just over \$800, excepting an additional amount paid in settlement of a previous tax dispute relating to the years 1952, 1953, 1955, and 1956. (II-B R. 19.)

On May 20, 1963, at a conference with Appellate Division representatives, taxpayer was orally advised of the precise character of the evidence necessary to substantiate the deductions claimed on his returns. Shortly thereafter the Appellate Division advisor corresponded with taxpayer, detailing with great specificity precisely the type of evidence required. The letter also advised taxpayer that he would be allowed ninety days from June 1, 1963, within which to produce the substantiating records and evidence which had not been forthcoming during the previous three years. The letter explained to the taxpayer that unless such substantiation was produced within that period the Internal Revenue Service would be without recourse other than to issue a statutory notice of deficiency. In point of fact, a period of more than six months was extended to the taxpayer for such purpose. (II-B R. 4-5; I-A R. 62.) Finally, on December 12, 1963, the Commissioner issued a deficiency notice which made the following adjustments with respect to taxpayer's unsubstantiated claims (I-A R. 7-17):

<u>Unallowed deductions</u>	<u>1957</u>	<u>1958</u>	<u>1959</u>	<u>1960</u>
Business loss	\$3,584.53	\$6,588.03	\$19,792.36	\$2,584.99
Rents - (1) Depreciation	1,000.00	1,000.00	1,000.00	1,000.00
(2) Repairs			1,140.00	675.00
(3) Fire loss				2,400.00
Casualty loss	1,300.00		600.00	
Medical expense	183.40	303.84		414.76
Capital loss				3,800.14

Acting pro se, the taxpayer on March 6, 1964, filed a petition for a redetermination of the deficiencies set forth in the Commissioner's notice. (I-A R. 1-17.) In his petition taxpayer averred under oath that (I-A R.5):

The normally available records to substantiate all of the items disallowed were destroyed by fires. The fact of the fires was clearly established and it was shown that the Petitioners required a considerable time to gather substantiating evidence. (Emphasis supplied.)

However, taxpayer failed to allege any facts which would substantiate the numerous deductions claimed on his returns. Accordingly, a motion was filed by the Commissioner seeking the dismissal of the proceedings for failure to state any relevant facts to sustain the assignments of error alleged in the petition. (I-A R. 20-21.)

Hearing on the motion was set for May 27, 1964, and notice thereof was given to the parties. (I-A R. 22.) Prior to the hearing, and on May 25, 1964, taxpayer filed an answer to the Commissioner's motion to dismiss and also an amendment to his allegedly defective petition. (I-A R. 23-30.) At the hearing, which was not attended by the taxpayer, the Tax Court concluded that the original petition failed to allege substantiating facts, but merely "vituperations against people in the Revenue Service." (II-B, Hearing, May 27, 1964, p. 4.) The Tax Court also concluded that the amendment to the petition did not cure the defects set forth in the motion. (I-A R. 32.) In keeping with the Commissioner's suggestion (II-B, Hearing, May 27, 1964, p. 2), however, the Tax Court refrained from dismissing the petition and by its order directed the taxpayer to file a proper amended petition by August 20, 1964, setting forth appropriate facts, or to show cause on August 26, 1964, why the case should not be dismissed for failure properly to prosecute. (I-A R. 32.) Thereafter, taxpayer retained counsel who prepared and, on August 18, 1964, filed an amended petition (I-A R. 33-51) which resulted in the discharge of the order to show cause (I-A R. 52^{4/}). Issue was joined on September 17, 1964, upon the filing of the Commissioner's answer to the amended petition (I-A R. 54-55), and, 4/ Counsel did not actually enter their appearance until September 4, 1964. (I-A R. 53.)

on December 30, 1964, the case was set for hearing in San Francisco on April 5, 1965 (I-A R. 56).

Under date of March 1, 1965, counsel for taxpayer filed a motion to continue the case to the Fall Session of the Tax Court, asserting as grounds therefor taxpayer's preoccupation as budget analyst for the Nevada legislature and his inability to spare the several days which would be necessary to travel to Tucson, Arizona, and Sacramento, California, to sort out records stored in those locations which would be necessary to establish the deductions at issue. (I-A R. 57-58.) And under penalty of perjury taxpayer on March 24, 1965, filed a declaration to the same purport in support of the motion. (I-A R. 67-68.) In opposition to the motion for continuance a notice of objection was filed averring the long and fruitless attempts to obtain from taxpayer evidence in support of the deductions in issue and, in particular, the contradictory statements made under oath by the taxpayer in the original petition that "The normally available records to substantiate all of the items disallowed were destroyed by fires" and the claimed existence of such records in Tucson and Sacramento. (I-A R. 61-66.)

Following its consideration of taxpayer's refusal over a period of five years to produce any evidence in substantiation of the deductions in issue and his contradictory assertions as to the availability of such evidence, the Tax Court denied the taxpayer's motion for continuance (II-B R. 8) for the reason that (II-B R. 9):

The statement here is that simply the man is too busy to come down here. That is what it amounts to. He has been notified since last December that this case is going to be set today and it is up to him to make arrangements.

The Tax Court continued (II-B R. 10):

There have been so many intermediate motions and petitions and the like and I can't see that there is any real basis except that the gentleman--he is not engaged in a trial or anything, he is working over in the Legislature, apparently, as assistant counsel, and he must be able to arrange his personal affairs. I think if we put it off it is going to be the same thing when it comes up again, and I don't think to continue it would serve any purpose.

Thereupon, the Tax Court set the trial of the cause for April 7, 1965.

(II-B R. 10-11.)

On April 7th and 8th, 1965, the case proceeded to trial, and after several hours of inconclusive testimony by the taxpayer during which "not one iota of evidence" (II-B R. 88, 114-115) with regard to any of the questioned items was adduced counsel for the taxpayer was warned that the burden of establishing the case was his (II-B R. 84, 87).

Thereupon counsel for the taxpayer renewed his ^{*motion for a continuance*} ~~objection to the granting~~ ~~of the Commissioner's motion~~ and the Tax Court announced--after stating that it had considered the written motion for continuance, the written objection thereto and the oral colloquy of counsel--its adherence to its prior ruling. (II-B R. 94-101.)

Following counsel's refusal to present further evidence on behalf of the taxpayer (II-B R. 102-103, 113), the Tax Court commented on taxpayer's refusal to stipulate the simple facts of the case and stated that there "have been indications that there have not been efforts to properly prepare the case or diligently get this matter out" (II-B R. 104). In this connection, the court invited the taxpayer to explain the apparent lack of diligence in the preparation. (II-B R. 104,

108-109.) Although taxpayer was physically in the courtroom (II-B R. 112), counsel did not seek to adduce his explanation for his dilatory conduct. In explanation, however, counsel stated on taxpayer's behalf that the failure to produce substantiating records was occasioned by the latter's compulsion to work abnormally long hours and his feeling that over the years the deadlines imposed by the Internal Revenue Service with respect to the records sought were too immediate. (II-B R. 116-117.) Upon the Commissioner's oral motion that the case be dismissed for lack of prosecution (II-B R. 112), the Tax Court on April 15, 1965, reluctantly dismissed the proceedings and sustained the deficiencies as determined by the Commissioner (I-A R. 71, II-B R. 120).

On May 10, 1965, counsel for the taxpayer filed a motion to set aside the order of dismissal together (I-A R. 72-77) with a supporting affidavit (I-A R. 78, 81) in which taxpayer alleged that it had been impossible for him to obtain the substantiating records under consideration because a financial disaster which occurred in 1950 made it necessary for him to spend virtually all of his time in trying to reestablish his erstwhile financial position, and because a fire had destroyed some of his records. Denial of this motion was made on May 12, 1965. (I-A R. 72.)

SUMMARY OF ARGUMENT

The Tax Court did not, under the circumstances disclosed by the record, abuse its discretion in denying taxpayer's motions for continuance, in granting the Commissioner's motion to dismiss, and in denying the taxpayer's motion to set aside the order of dismissal.

The granting or denial of a continuance after issue is joined is a matter strictly within the discretion of the trial court. The same is true of the grant or denial of a motion to dismiss for failure to prosecute and the grant or denial of a motion to set aside an order of dismissal. The trial court's action in any such matter will not be overruled by an appellate court unless there has been a clear abuse of that discretion.

Lack of preparation is not a ground for obtaining a continuance unless there is a valid reason for such lack. Where it appears that a party has not had time to prepare for trial, a continuance will be granted; but where, as here, a party who might have been prepared for trial will very seldom be granted a continuance because, for reasons of his own convenience, he is not prepared. In such a case it is clear that the exercise of the trial court's discretion will not be disturbed. Having rightfully denied the taxpayer's requests for a continuance, it was not, under the circumstances, an abuse of discretion for the Tax Court to dismiss the proceedings for want of prosecution. Not to have done so would have rendered meaningless its previous action. Similarly, the Tax Court did not abuse its discretion in denying taxpayer's motion to set aside its order of dismissal. In this case, the only basis for such a motion is that its previous actions involved an abuse of discretion, which they did not.

ARGUMENT

THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTIONS FOR CONTINUANCE AND IN GRANTING THE COMMISSIONER'S MOTION TO DISMISS FOR LACK OF PROSECUTION; NOR DID THE TAX COURT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTION TO SET ASIDE THE ORDER OF DISMISSAL

The taxpayer charges the Tax Court with abuse of discretion in denying his motions for continuance and thereafter in granting the Commissioner's motion to dismiss for failure to prosecute and in denying his motion to set aside the order of dismissal. For these reasons it is urged that the order of dismissal be reversed and that the case be remanded to the Tax Court with instructions that it be set for trial. We submit that there is no merit to the taxpayer's contentions with respect to any of the Tax Court's actions since each such action involved no abuse of that body's discretion. We fully agree with the taxpayer (Br. 7) that the fundamental question the Tax Court had to answer was whether the taxpayer should have been given more time to prepare his case. We apprehend also that the answer to this question is decisive of each of the errors alleged on this appeal since each alleged error is grounded solely upon the Tax Court's alleged abuse of discretion in denying taxpayer's motions for a continuance. Vevelstad v. Flynn, 230 F. 2d 695 (C.A. 9th), certiorari denied, 352 U.S. 827; United States v. Pacific Fruit & Produce Co., 138 F. 2d 367 (C.A. 9th); Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th). Moore, Federal Practice (2d ed.), par. 41.11, p. 1125.

A consideration of the applicable law and the peculiar facts of this case makes it plain that the denial by the Tax Court of the taxpayer's motion for a continuance was based upon established considerations of fairness, justice and sound judicial administration. It is universally accepted that the grant or denial of a motion for a continuance is within the sound discretion of the trial court, and on appeal the applicable standard is that of the presence or absence of abuse. United States v. Pacific Fruit & Produce Co., *supra*; Duisberg v. Markham, 149 F. 2d 812 (C.A. 3d); Woodbury v. Commissioner, 231 F. 2d 121 (C.A. 3d); Golding v. United States, 219 F. 2d 109 (C.A. 4th); Girard Trust Co. v. Amsterdam, 128 F. 2d 376 (C.A. 5th); Scholl v. Felmont Oil Corp., 327 F. 2d 697 (C.A. 6th); Andrews v. Hotel Sherman, 138 F. 2d 524 (C.A. 7th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th); Baltimore American Ins. Co. v. Pecos Mercantile Co., 122 F. 2d 143 (C.A. 10th); Bressler v. Bressler, 274 F. 2d 91 (C.A. D.C.). Discretion indicates the absence of a hard and fast rule. Langnes v. Green, 282 U.S. 531, 541. A request for a continuance, as here, because of inadequate preparation is subject to these principles. Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); United States v. Pacific Fruit & Produce Co., 138 F. 2d 367 (C.A. 9th); Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th); Everts v. Will S. Fawcett, Co., 3 Cal. App. 2d 261, 38 P. 2d 868.

Neither party to a law suit, of course, should be forced to trial before he has an adequate opportunity to investigate the facts and to prepare his case. However, the proper administration of the judicial process requires the elimination of unnecessary delay in the trial of

cases and the prompt dispatch of judicial business. The trial courts must and do have broad discretion in managing their calendars and in holding litigants to assigned dates in order to facilitate the orderly trial of cases before them in view of the limited judicial manpower and court officials available. Janousek v. French, 287 F. 2d 616, 623 (C.A. 8th); Sweeney v. Anderson, supra, p. 758. This Court long since made clear the litigant's responsibility in Hicks v. Bekins Moving & Storage Co., supra, p. 409, in its quotation from Inderbitzen v. Lane Hospital, 17 Cal. App. 2d 103, 106, 61 P. 2d 514, 516:

The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal. (Emphasis supplied.)

Here, the taxpayer's posture is the antithesis of the requirement clearly stated in the Hicks case. While want of preparation of a litigant's case may, upon a showing of some precise legal or strong equitable reason, constitute a ground for a continuance, such is not the case when such an absence of preparation is coupled with the negligence, indifference, lack of diligence and ambivalence of position manifested by the instant taxpayer. As the record shows, for a period of about five years prior to the conduct of the proceedings below, the Internal Revenue has exercised every effort to obtain from the taxpayer evidence to substantiate large deductions claimed by him. Thus, in letter after letter (II-B R. 4, 106, 109) the Internal Revenue Service solicited the taxpayer's production of records or other evidence to substantiate his claims. And to these queries taxpayer responded

contradictorily that the supporting records were burned or destroyed and that, should a little more time be extended, they would be made available.

(II-B R. 4.) In his original petition (I-A R. 1-17) taxpayer averred under oath that "The normally available records to substantiate all of the items disallowed were destroyed by fires" (I-A R. 5). In point of fact, however, the probabilities are that only a small portion of the supporting records for the years at issue were consumed in a fire which occurred on March 24, 1959. (I-A R. 79.) Clearly, records relating to transactions after that date were not destroyed as stated. Thus records relating to the years 1959 and 1960 should have been intact. And, in view of the date of the fire and the filing date of the 1958 return, there would appear a strong probability that records sufficient to serve as a basis for the detailed deductions claimed for that year were spared as well. In any event, between the time that the audit of the first of the years in issue took place in 1959 (I-A R. 61-64) and the date of the hearing in 1965, taxpayer had ample ^{5/} time to assemble or reconstruct his supporting records.

Although taxpayer did not retain counsel until July, 1964 (I-A R. 73), he was fully advised of the nature of the evidence required to support his claim, both orally at conference on May 20, 1963

5/ At the hearing, taxpayer claimed he was unable to produce supporting records. Yet, on his 1960 income tax return he claimed as a business deduction on Schedule C several hundred dollars of business expenses with the following explanation (II-B R. 22, Ex. 4-D):

The major business activity was intensive work replacing burned records of previous business activities in Pennsylvania and Arizona as demanded by the Internal Revenue Service. This involved extensive correspondence, long distance telephone calls and Several (sic) trips. Trips to I. R. S. office in San Francisco were necessitated.

(II-B R. 4), and, shortly thereafter, by detailed written advice (II-B R. 5).^{6/} Nor was he placed under undue pressure to produce such evidence. To the contrary, although taxpayer was at long last notified in writing that unless he produced in ninety days the evidence he had failed to produce during the several preceding years, a statutory notice of deficiency would issue (II-B R. 5), more than six months were permitted to expire before the notice actually issued on December 12, 1963.

The chronology of the case, particularly in view of its tortuous background and the indefinite continuance sought, also demonstrates that the taxpayer was not rushed to trial. More than nine months passed between the mailing in December, 1963, of the statutory 90-day letter (I-A R. 7-17), which in great detail set forth the position of the Commissioner, and the filing of the Commissioner's answer to taxpayer's amended petition (I-A R. 33-40) on September 17, 1964. In July 1964, taxpayer retained counsel of exceptional competence, and on December 30, 1964, the trial was set for April 5, 1965. Thus, after several years of opportunity to marshal evidence to support his deductions prior to the filing of the statutory notice, there remained to the taxpayer almost sixteen months more in which to substantiate his case. Moreover, although the reasonable opportunity to prepare for trial pertains to the litigant and not to his attorney (Miller v. Johnson, Inc., 191 Va. 768, 62 S.E. 2d 870; Brunson v. Hamilton Ridge Lumber Co., 122 S.C. 436, 115 S.E. 624; Berger v. Mantle, 18 Cal. App. 2d 245, 63 P. 2d 335) counsel had more than eight months for preparation.

^{6/} That taxpayer was not uninformed in this matter is made clear by the fact that he was involved in similar proceedings in the Tax Court for the years 1952, 1953, 1955 and 1956. (II-B R. 7.) In that proceeding, which was ultimately settled, taxpayer sought and was granted two continuances.

Under the record before it it is difficult to perceive how the Tax Court could have concluded other than that the taxpayer had ample time to prepare his case. It is true that the Tax Court could have in its discretion at the hearings on April 5 or April 7 and 8, 1965, or at any time prior thereto, granted any continuance which it felt to be reasonable. Cf. Bedgisoff v. Cushman, 12 F. 2d 667 (C.A. 9th). But it properly refrained from doing so in view of the startling and protracted display of dilatory conduct and complete lack of diligence on the part of the taxpayer. Nor should the taxpayer's protestations of official duties and the need for substantial expenditures (I-A R. 67-68, 78-81) necessarily have compelled the Tax Court to grant the continuance. It is well established that official duties of a far higher character than those here involved and the necessity of expenditures of a similar magnitude need not lead to the grant of a continuance of judicial proceedings. Sweeney v. Anderson, 129 F. 2d 756 (C.A. 10th). Moreover, the true underlying causes of the alleged need for additional time for preparation involve duty and expense not at all. As taxpayer's counsel candidly explained (II-B R. 116-117), during the time when the taxpayer should have pursued diligently the preparation of his case he was under a compulsion to work abnormally long hours to reestablish a lost fortune, "to work perhaps toward a pie in the sky * * *." He felt--over a period of about five years--that he had never been given sufficient time to gather his evidence.

Lack of preparation is not a ground for obtaining a continuance unless there is a valid reason for such lack. Manifestly, an unfettered compulsion to utilize all of one's time to establish a fortune

is not such a reason. No more is a supposed lack of time to gather evidence such a reason when time in the magnitude of five years was available. As was observed by this Court in United States v. Pacific Fruit & Produce Co., 138 F. 2d 367, 372:

Where it appears that a party has not had time to make adequate preparation for trial, a continuance will be granted, but a party who might have been prepared for trial will very seldom be granted a continuance because he is not prepared, and certainly in such a case the exercise of the court's discretion will not be disturbed.

It is well settled that a court has inherent power to dismiss a civil case for lack of prosecution. Link v. Wabash Railroad Co., 370 U.S. 626; United States v. Pacific Fruit & Produce Co., supra; Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (C.A. 9th); Janousek v. Wells, 363 F. 2d 118 (C.A. 8th); Grunewald v. Missouri Pacific Railroad Co., 331 F. 2d 983 (C.A. 8th). Dismissal under such circumstances is a matter of discretion. As the Supreme Court indicated in the Link case, supra, 370 U.S., p. 633:

Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

Here, following the Tax Court's denial of taxpayer's motion for continuance, the taxpayer refused to proceed further with the presentation of his case. (II-B R. 102.) Necessarily, having rightfully denied taxpayer's request for a continuance, it was not, under the circumstances, an abuse of discretion for the Tax Court to grant the Commissioner's motion to dismiss for want of prosecution. Vevelstad v. Flynn, 230 F. 2d 695 (C.A. 9th); United States v. Pacific Fruit & Produce Co., supra; Hicks v. Bekins Moving & Storage Co., supra; Sweeney v.

Anderson, 129 F. 2d 756 (C.A. 10th). To have done otherwise could have done no other than vitiate the substance of its order of denial.

Nor do we perceive any abuse of discretion in the Tax Court's denial of the motion to set aside the order of dismissal. The Tax Court unquestionably can grant a rehearing for good cause shown. But, as in the case of a continuance after issue is joined and a dismissal for lack of prosecution, the granting or denial of a rehearing or new trial is within the sound discretion of the trial court and its action in such matters should not be overruled in the absence of a clear abuse of discretion. With respect to such motions, and other similar intermediate proceedings before the trial court, the Supreme Court said in Wright v. Hollingsworth, 1 Pet. 164, 168, where an amendment to the complaint had been allowed:

But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discussion [sic] of the courts or original jurisdiction, as to be fit for their decision only, under their rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this court attempting to reverse and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly, it was held by the court, in Wood v. Young, 5 Cranch 237, that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned; that the refusal of the court below to grant a new trial, is not a matter for which a writ of error lies, 5 Cranch 11, 187, and 4 Wheat. 220; and that the refusal of the court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal on a writ of error. We can perceive no distinction in principle

between these cases, and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued, to be paid, as a condition of the amendment.

See also Hicks v. Bekins Moving & Storage Co., supra; Vevelstad v. Flynn, supra.

The grounds on which a trial court may grant a rehearing, reconsideration or new trial in its discretion are many and varied. The most usual grounds for granting a new trial are newly discovered evidence, changes in the law, changes in the facts, errors in the admission or exclusion of evidence where the decision is contrary to law or not supported by the evidence, and the like. But when the record in this case is considered in the light of the grounds upon which a rehearing or new trial will ordinarily be granted, it is clear that the Tax Court did not abuse its discretion in denying the request to set aside the order of dismissal. The only basis for such request in this case is that the Tax Court abused its discretion in refusing to grant the taxpayer's motions for a continuance and in granting the Commissioner's motion to dismiss. We have demonstrated above that the Tax Court's actions in those instances were fully warranted. No more did its refusal to set aside the order of dismissal constitute an abuse of discretion, since the sole grounds for such action would be an abuse of discretion in respect of the previous motions. Moreover, we entertain serious doubts that an appeal would lie from the Tax Court's order denying the motion to set aside the order of dismissal. Hicks v. Bekins Moving & Storage Co., supra, p. 409.

To sustain its contention that the Tax Court erred in failing to grant its motion for a continuance, the taxpayer cites (Br. 9) Alamance Industries, Inc. v. Filene's, 291 F. 2d 142 (C.A. 1st), and asserts that it "provides some analogy to the present case." Other than involving a motion for a continuance, that case provides no analogy at all and is markedly distinguishable on its facts. In like vein taxpayer relies (Br. 13) upon Carnegie Nat. Bank v. City of Wolf Point, 110 F. 2d 569 (C.A. 9th), and Thomas v. Commissioner, 185 F. 2d 851 (C.A. 6th), as establishing his contention that the Tax Court erred in granting the Commissioner's motion to dismiss for failure to prosecute. Any reliance on these cases is misplaced. The Thomas case (p. 852) involved a bizarre instance of dismissal for failure to prosecute "due to the fact that counsel has no standing in this court * * * and the taxpayer is not represented." The abuse found by the Sixth Circuit consisted not in the trial court's denial of a motion but in its denial of permission to counsel to file such a motion. In the Carnegie Nat. Bank case, this Court held that it was an abuse of discretion for one district judge, on his own motion, to dismiss a case in which another judge on the same court had already entered his decision. This Court reasoned (110 F. 2d, p. 573):

As the case stood, appellants had won the decision, but neglected to secure a decree thereon. To be summarily deprived of the fruits of victory now would appear a penalty so harsh that only extreme provocation would justify it.

Finally, the taxpayer suggests (Br. 13-15) that the Tax Court acted injudiciously in dismissing for failure to prosecute because it did not consider all the pertinent circumstances. This, simply,

is untrue. Rarely does a court display a greater mastery of the facts and circumstances of a case than is evinced by the instant record, particularly where the court summarized (II-B R. 94-122) the taxpayer's posture. Not only did the court consider all pertinent circumstances, it repeatedly invited counsel to present an explanation of such circumstances. (II-B R. 105, 108, 113, 114.) Counsel's initial apparent eagerness to accept these invitations (II-B R. 112) seems to have evaporated and the matter was dropped with the candid statement (II-B R. 116) that taxpayer over the years had simply been too busy rehabilitating his personal fortune to gather the evidence necessary to substantiate his deductions. Taxpayer here confesses appealingly his unwarranted lack of diligence over a protracted period and seeks to avoid the consequences thereof by announcing he is now ready to get on with his case. This Court has on more than one occasion answered this cavalier approach to the judicial process. Thus, in United States v. Pacific Fruit & Produce Co., 138 F. 2d 367, 372, this Court stated:

The appellant assures us that it "now has available competent evidence as to the market value of the 1937 crops." This preparedness comes tardily. In Hicks v. Bekins Moving & Storage Co., 9 Cir., 115 F. 2d 406, 409, we said: "Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence."

CONCLUSION

The action of the Tax Court in the instant case was proper and its decision is correct. The order of dismissal and decision should be affirmed.

Respectfully submitted,

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MARCH, 1966.

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1966.

Attorney

APPENDIX

Rules of Practice, Tax Court of the United States (Rev. 1958, 1964 ed.):

RULE 19. MOTIONS

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(b) Motions will be acted upon as justice may require and may, in the discretion of the Court, be placed upon the motion calendar for argument. Disposition of motions will be expedited if the party filing the same, after consultation with his adversary, is able to note on the motion that there is no objection thereto. (See Rule 27(a) and (d) and Rule 30(b).)

(c) The filing of a motion shall not constitute cause for postponement of a trial from the date set. (See also Rule 27(d) with respect to motions for continuance.)

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RULE 20. EXTENSIONS OF TIME

(a) An extension of time (except for the absolute time limit on filing of the petition, see section 6213(a), Code of 1954, and except as otherwise provided in these Rules) may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor or may be ordered by the Court upon its own motion.

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RULE 21. DISMISSAL

A case may be dismissed for cause upon motion of either party or of the Court. (See Rule 7(a)(2) and Rule 27(c)(3).)

RULE 27. PLACE, TIME, AND NOTICE OF HEARINGS AND TRIALS--
ATTENDANCE AND CONTINUANCES

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(d) Continuances--Motions--Trials.--

(1) Court action on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth good and sufficient cause, and complies with all applicable Rules.

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